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No. 88-1234

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

UNITED SERVICES AUTOMOBILE ASSOCIATION,
AN UNINCORPORATED ASSOCIATION,
Petitioner,

versus

LEROY TUCK, ADMINISTRATOR OF THE ESTATE OF JOHNNY L. TUCK, DECEASED, LEROY TUCK, AN INDIVIDUAL AND DOROTHY TUCK, AN INDIVIDUAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This Reply in support of USAA's Petition for Writ of Certiorari addresses the narrow issue raised by respondents in their second proposition heading that review under writ of certiorari is premature. Although respondents fail to argue or support with competent authority their assertion that this matter is not ripe for review, ripeness considerations are an aspect of justiciability and are, therefore, always worthy of response.

Because the district court is acting outside of its primary power, the matter is ripe for review both under this Court's general supervisory power and in the ordinary course of proceedings. The judgment of the district court, reviewed by the Tenth Circuit, was a final, reviewable order. An erroneous decision by the appellate court is certainly reviewable by Writ of Certiorari. Indeed, Respondents' argument would, in theory, *always* prevent further appellate review of decisions of courts of appeals which involve remand. Certainly that is not the rule. Sup. Ct. R. 17.1.

The argument that the matter is not "ripe" also fails because a petition for writ of certiorari may be granted to review a *pending* federal action when there is a showing "of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 18. *See also* 28 U.S.C. (1982) § 2101(e). Certainly an improper exercise of the district court's jurisdiction (pursuant to instructions on remand from a court of appeals) where there is not simply a defect in the court's jurisdiction, but rather a complete

absence of any power to act, constitutes such a matter of imperative public importance. Here the district court *unquestionably* lacks *primary power* to act further in this case.

The *only* defendant below (petitioner here) is United Services Automobile Association. This jural person is an unincorporated association, clearly found to be an Oklahoma citizen for purposes of diversity jurisdiction. The plaintiffs below (respondents here) are also clearly Oklahoma citizens. The Tenth Circuit explicitly found the requisite diversity of citizenship lacking:

> The Tucks offer nothing that persuades us to depart from the holding in *Baer*. Accordingly, we are forced to conclude that, as the case now stands, there is not complete diversity among the parties and subject matter jurisdiction is lacking.

Tuck v. United Services Automobile Association, 589 F.2d 842, 845 (10th Cir. 1988).

The Tenth Circuit, however, did not remand for dismissal, but "for appropriate motions ... and *further proceedings* consistent with this opinion." *Id.* at 847 (emphasis supplied). Those proceedings have, to date, included plaintiffs' "Motions to Amend" (suggesting USAA be dismissed, additional parties be added and the amendments "relate back" and bind those non-parties) and "Motion to Assess Sanctions" against USAA (for raising the jurisdictional defect here and allegedly either raising similar defects or failing to do so in other federal cases.) The district court has proceeded by issuing orders for scheduling and settlement conferences, by granting plaintiffs leave to pursue discovery by filing interrogato-

ries, and by entertaining the plaintiffs' motions. Further, a renewed motion to dismiss by defendant, based on lack of subject matter jurisdiction, has not been ruled upon. All of this activity has occurred after the Tenth Circuit's determination that subject matter jurisdiction is lacking and before any amended Complaint has been filed.

Because it is clear that subject matter jurisdiction does not exist, nor has ever existed in this action, this Petition for Writ of Certiorari was filed.

The Respondent argues that the Tenth Circuit's power of review was properly exercised when the case was remanded and that the Petition For Writ of Certiorari is "premature". This position ignores both the substance and the effect of the Tenth Circuit's remand (for purposes other than dismissal) of a case over which subject matter jurisdiction does not exist. Whether the district court has yet proceeded at all is really irrelevant to the issue here presented. Even had the district court taken no action to date, that would not implicate a lack of ripeness situation, for a lower court is bound to respect the mandate of an appellate tribunal. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). The mandate is completely controlling as to all matters within its compass, *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939), and the lower court is required to scrupulously and fully carry it out, *United States v. E.I. DuPont De Nemours & Co.*, 366 U.S. 316 (1961). The very existence of the mandate itself creates the imminence of the harm threatened. Therefore, lack of ripeness is not implicated by assertion that the district court has yet to take action.

While this Court clearly will make its own determination of the existence or non-existence of conflicts among the circuits regarding whether *substantive* amendments to pleadings may be used to preserve jurisdiction in *both* an additive and a "subtractive" sense (by dismissing parties whose presence destroys subject matter jurisdiction and adding other parties not originally in the litigation), the central issue here is more fundamental. It squarely presents the question: What power exists in the federal courts to act in the face of an express finding of lack of subject matter jurisdiction?

The district court lacks jurisdiction of the subject of this action. Because subject matter jurisdiction is the constitutional *sine qua non* of the court's primary power to act, the imposition of sanctions, or any other "further proceedings" is before the district court in a situation clearly outside of the scope of the federal courts' grant of *primary power.* That issue is of substantial importance, both to litigants generally and to the public.

Petitioner U.S.A.A. respectfully submits that its Petition for Writ of Certiorari should be granted and the Writ issued.

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